Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

REDDWARF STARWARE, LLC,

Petitioner,

v.

MEADE INSTRUMENTS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether this Court's *FirstTier* decision mandates the Federal Circuit's rejection of the "cumulative finality" doctrine of appellate jurisdiction which has been expressly adopted and consistently applied by virtually all of the other circuit courts as a means of "ripening" premature notices of appeal?

2) In the absence of prejudice and in the interest of justice, does Federal Rule of Appellate Procedure 2 compel a Court of Appeals to suspend the customary rules of finality for purposes of appeal in a case where the parties by their conduct and submissions to the district court have clearly manifested their intent to pursue an immediate appeal from a decision of a district court which practically disposed of the only matter in dispute between the parties but where the notice of appeal was filed prior to the taking of certain ministerial acts consistent with the expressed intent of the parties to allow the pursuit of an appeal?

PARTIES TO THE PROCEEDING

Petitioner, Reddwarf Starware, LLC (also known as Reddwarf Instruments, LLC), has no parent company.

There are no subsidiaries or affiliates of Reddwarf Starware, LLC that have issued shares to the public.

The names of all parties in the Court whose judgment is sought to be reviewed appear in the caption of this Petition for a Writ of Certiorari.

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PETITION FOR WRIT OF CERTIORARI

Reddwarf Starware, LLC hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINION BELOW

The Federal Circuit's panel opinion dismissing the appeal of Reddwarf is reported at 250 F.3d 759 (table) (Fed. Cir. 2000) and the Federal Circuit's subsequent denial of Reddwarf's Petition for Rehearing and Suggestion for Rehearing En Banc are reprinted herein as Appendix A.

JURISDICTION

The Federal Circuit dismissed Reddwarf's appeal upon a motion from Meade Instruments Corporation (hereafter "Meade") on June 23, 2001. Reddwarf's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Federal Circuit on March 12, 2001. The Chief Justice granted an extension of time for filing this petition to and including July 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 2 states:

> On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

Federal Rule of Appellate Procedure 4(a)(2) states:

> A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the order.

STATEMENT OF THE CASE

There is absolutely no legitimate interest served by the decision of the Federal Circuit Court of Appeals denying appellate review in this matter to Reddwarf. Indeed, to deny Reddwarf an ability to have it appeal heard will serve only to reward its adversary in the litigation for its substantial role in bringing about this unfortunate result. As was pointed out in response to the motion to dismiss the appeal, there is no prejudice of any kind that appellee suffered in this case. Instead they are reaping an unearned benefit from the decision of this Court.

This matter arises out of an action brought by Meade against Reddwarf in the Central District of California

seeking a declaration of patent invalidity and non-infringement as well as relief on antitrust and unfair competition claims and a request for an injunction against claims by Reddwarf that Meade's products were infringing. Reddwarf counterclaimed for patent infringement. (App. 1)

Following a period of discovery, Meade moved for summary judgment on the patent infringement issues that were at the core of the dispute. On July 2, 1999, the court entered a summary judgment in favor of Meade on its noninfringement claim, reserving the issue of attorneys' fees. Meade's request for injunctive relief and the other claims asserted remained pending. (App. 2)

On July 27, 1999, Reddwarf filed a notice of appeal from the district court's July 2, 1999 judgment on the patent claims and, on that same date, filed a motion pursuant to Federal Rule of Civil Procedure 54(b) for certification of the July 2, 1999 judgment and an earlier order denying a motion to dismiss on the basis of a lack of personal jurisdiction. (App. 2) Prior to the hearing on the Rule 54(b) motion, the parties reached a stipulation that was presented to the district court on August 24, 1999. Pursuant to the stipulation, the court dismissed without prejudice Meade's remaining claims and its request for injunctive relief and struck from the calendar as moot Reddwarf's pending motion for Rule 54(b) certification. (App. 2)

On January 18, 2000, the court directed the entry of judgment incorporating its ruling on the infringement issues, the dismissals done pursuant to the stipulation and an award of attorneys' fees to Meade made pursuant to motion following the disposition of the patent infringement claims. Reddwarf did not file an additional notice of appeal following the entry of judgment on January 18, 2000. (App. 2)

Meade moved to dismiss the Reddwarf appeal on the basis that the Federal Circuit lacked jurisdiction to hear the appeal, arguing that Reddwarf's July 27, 1999 notice of appeal was premature. Reddwarf opposed the motion stating that the well established law of the Ninth Circuit (which the Federal Circuit was obliged to apply in this case), as well as the law of a substantial majority of other circuits, allowed the court to exercise jurisdiction over the appeal under the doctrine of "cumulative finality." The Federal Circuit granted Meade's motion to dismiss in an unpublished order dated June 23, 2000 (App. 1) and subsequently denied Reddwarf's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 9)

In reality, the case below involved issues of patent infringement – nothing more and nothing less. Although appellee Meade Instruments Corporation (hereafter "Meade") added some gratuitous additional claims to its complaint below; these other claims never received any attention from the parties or the court during the pendency of the litigation. They were forgotten, "tag along" claims. Thus, when the district court granted Meade's motion for summary judgment on the ground of non-infringement, the parties and the court believed that the case was over. Certainly Meade did not intend to pursue

its claims against Reddwarf after it won the victory that it sought on the patent infringement claim. The wording of the judgment submitted to the court for execution by Meade made no reference to the fact that this was a "partial" summary judgment. In fact, the order submitted by Meade for execution by Judge Taylor stated that the judgment being entered was both "final" and "appealable." Meade clearly wanted the court and Reddwarf to believe at that moment that the case was over but for an attorneys' fees motion.

Soon thereafter, however, counsel for Reddwarf discovered that, notwithstanding the grant of summary judgment, the additional "tag along" courts asserted by Meade were still pending. Like Meade, Reddwarf's counsel understood that the case was effectively over with the granting of the summary judgment. Reddwarf's counsel decided on a two-pronged approach: file a notice of appeal immediately and seek Rule 54(b) certification to preserve Reddwarf's rights. Thus, upon the filing of the Rule 54(b) motion, this case was on a path that would have led to a result before the district court that would have resolved definitively the issues that are currently being faced. If that motion had proceeded to hearing, the district court would have either granted the motion or implored counsel to take steps on the record to make it clear that the grant of the summary judgment motion had been dispositive of the whole case.

However, counsel for Meade did not allow the matter to be decided by the court in connection with the Rule 54(b) motion. Meade deliberately sidetracked the consideration of that motion by stipulating to the dismissal of the additional counts that it had added to its papers as a

meaningless afterthought by stating that in papers submitted to the district court that the certification motion was "unnecessary." Counsel for Meade took the laboring oar in preparing a stipulation that acknowledged that Reddwarf had already filed a notice of appeal, agreed to dismiss the remaining counts asserted against Reddwarf by Meade, and stated: "Meade no longer wishes to pursue its Second, Third and Fourth Claims for Relief thereby rendering the Rule 54(b) motion 'moot'."

Meade's "gotcha" plan for winning the appeal without ever having a consideration of the merits became apparent when it filed the motion to dismiss the appeal more than eight months after the notice of appeal was filed by Reddwarf.

REASONS FOR GRANTING THIS PETITION

Contrary to the holding of the Federal Circuit Court of Appeals in this case, the decision of the United States Supreme Court in *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 111 S.Ct. 648, 112 L.Ed. 2d 743 (1991), does not stand for the proposition that the "cumulative finality" doctrine of appellate jurisdiction is no longer valid. Indeed, in the vast majority of decisions addressing the issue following *FirsTier* it has been held that the premature filing of a notice of appeal can be cured by subsequent events taken prior to the decision of the case on appeal. Therefore, the holding of the panel puts the Federal Circuit among a small minority of circuits who have chosen to interpret *FirsTier* and Federal Rule of Appellate Procedure 4(a)(2) in a highly technical

and restrictive manner. The conflict between the circuits on such a fundamental and important issue of appellate jurisdiction deserves to be addressed and clarified by this Court.

In the decade since *FirsTier* was handed down virtually every circuit has had occasion to interpret and apply the *FirsTier* doctrine in a variety of factual settings. The results of that interpretative effort have been substantially one sided but not unanimous. Most have continued to apply the doctrine of "cumulative finality" on the basis that it is not at odds with the holding in *FirsTier. See Lazy Oil Co. v. Witco Corporation,* 166 F.3d 581 (3d Cir. 1999) (Becker, C.J.). The Seventh Circuit and arguably the Fifth Circuit have indicated that the use of "cumulative finality" to save premature appeals was forbidden by *FirsTier.* The Federal Circuit has now joined this small minority with its recent decision in this case and in a subsequent unpublished decision on similar facts. *Stoney Point Products, Inc. v. Underwood,* 2001 WL 706910 (Fed. Cir. 2001) (table). Thus, as it stands today the ability to secure appellate review of a decision rendered in a United States District Court is entirely dependent on where you happen to have your case heard. Moreover, the conflict between the circuits over the issue of "finality" for appeal purposes once again needs to be addressed by this Court.

In reaching decisions contrary to the result reached by the panel in this case, the circuit courts of appeals that make up the clear majority on this issue have found that the *FirsTier* decision must, in effect, be limited to its facts. Accordingly, these other courts have indicated that where an appeal is taken, as in *FirsTier,* from a decision which is truly preliminary and without any apparent indicia of finality, the notice of appeal cannot later mature into an

appropriate basis for appellate jurisdiction. However, where a notice of appeal is filed following a final and definitive decision of the district court on one or more aspects of the case, all of the circuit courts comprising the majority have held that there is no valid reason to disallow the pursuit of the appeal so long as the remaining ministerial acts (typically involving the dismissal of "tag along" parties or claims as was the case here) are completed prior to the consideration of the matter by the appellate court. In addition, at least one court has determined that the specific Rule of Appellate Procedure addressed and considered in *FirsTier* – Rule 4(a)(2) – is inapplicable to circumstances where a notice of appeal followed entry of judgment as to less than all the parties or claims.

All of these decisions that make up the majority position among the circuit courts share a consistent approach to the issue of appellate jurisdiction that is sorely lacking in the decision reached by the panel of this Court – an interpretation of the rules of finality for appellate jurisdiction purposes which that assures review to those who seek it rather than to deny review on appeal based on technicalities. In this manner, the majority position is supported by and consistent with Federal Rule of Appellate Jurisdiction 2 which allows the provisions of any rule to be suspended in order to avoid "manifest injustice."

A. THE FEDERAL CIRCUIT COURT ORDER DISMISSING REDDWARF'S APPEAL DEMONSTRATES THE CLEAR CONFLICT BETWEEN THE CIRCUITS ON THE ISSUE OF "CUMULATIVE FINALITY" IN APPELLATE JURISDICTION

For all practical purposes, Judge Taylor's non-infringement ruling upon which judgment was entered in July of 1999 terminated this litigation. This case had been tried from the outset as a pure patent proceeding. The other claims asserted by Meade were merely gratuitous window dressing. In granting the motion, the court not only disposed of the declaratory judgment and the counterclaim for infringement which were the subject of the motion, but effectively ended the litigation on the collateral claims by Meade as well. Prior to the hearing, Meade's counsel admitted that it had suffered no damages. In the absence of measurable harm, the antitrust and unfair competition claims could not have gone forward.

Thus, the decision from which Reddwarf took an appeal was unquestionably a final one as to the only real issue in the case. According to authority from the Fifth Circuit Court of Appeals, this degree of finality is sufficient to vest this Court with appellate jurisdiction. In *Barrett v. Atlantic Richfield Company*, 95 F.3d 375 (5th Cir. 1996), an appeal was taken following the entry of a judgment resolving the claims against most but not all of the plaintiffs. Ultimately those other claims were resolved as well. However, the only notice of appeal filed in the case predated the entry of the final judgment by almost six months. *Id.* at 378.

Nonetheless, the Fifth Circuit found that it had appellate jurisdiction over the matter. Analyzing the interplay between Federal Rule of Appellate Procedure 4(a)(2) and Federal Rule of Civil Procedure 54(b) on the one hand and the decision of the United States Supreme Court in *FirsTier Mortgage Co.*, on the other, the court in *Barrett* determined that the key issue was whether the order which was the subject of the notice of appeal "would have been appealable if immediately followed by the entry of judgment pursuant to Federal Rule of Civil Procedure 54(b)." *Id.* at 379. Even though no Rule 54(b) certification had been sought in *Barrett*, the court concluded that there was sufficient "finality" in the action taken by the district court to satisfy the requirements of F.R.App.P. 4(a)(2). *Id.*[1]

The same result should have applied in this case. The decision on the district court on the patent issues in the case was undeniably "final" upon its announcement of

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[1] The panel that ordered the *Reddwarf* appeal dismissed misread *Barrett* as having been abrogated by the subsequent decision of the Fifth Circuit in *U.S. v. Cooper*, 135 F.3d 960 (5th Cir. 1998). This conclusion was in error. The Fifth Circuit in *Barrett* acknowledged that previous decisions of that Court had adopted a "more expansive rule" on appellate jurisdiction than the Supreme Court's *FirsTier* decision seemed to allow. That "more expansive rule" which allowed even purely interlocutory appeals to be heard was abrogated subsequently by the Fifth Circuit in *U.S. v. Cooper*. However, the *Cooper* decision is in complete harmony with the result in *Barrett*. Obviously if the Fifth Circuit in *Cooper* had intended to overrule *Barrett*, it could have done so. However, no mention was made of *Barrett* in the *Cooper* decision. Rather, the *Cooper* court only overruled the "more expansive rule" which was found not to be invoked in *Barrett*.

the decision on the motion for summary judgment. As was the case in *Barrett*, that order would have been immediately appealable if the court had immediately entered judgment pursuant to Rule 54(b). The fact that it did not is irrelevant. The decision in *FirsTier* is concerned with the "finality" of decisions from which appeals are taken, not with the technicality of how they are taken as Meade urges. The Fifth Circuit cut through similar arguments in *Barrett* and achieved a result that was both legally correct and practical. The same approach should have been applied in this case.

In fact, the actions taken here present an even stronger case for the exercise of appellate jurisdiction than was present in *Barrett*. In this case, Reddwarf moved for a Rule 54(b) certification. It is well established that a premature notice of appeal "ripens" upon the entry of a proper Rule 54(b) certification. The law is crystal clear on this point. For example, the First Circuit Court of Appeals addressed this "jurisdictional quagmire" in *Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1184-85 (1st Cir. 1994). The court in *Clausen* carefully considered all of the case law on the subject (including the Supreme Court's *FirsTier* decision) before concluding that it would join with the Second, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits in holding that a belated Rule 54(b) certification "ripens a premature notice of appeal as of the date of the certification." *Id.* at 1184.

In this case, a motion for Rule 54(b) certification was made and would in all likelihood have been granted to Reddwarf since Meade announced in its "opposition" to the motion that it was no longer interested in pursuing its

remaining claims.[2] Instead, the parties decided not to burden the district court with the necessity of resolving that motion and presented a revised final judgment resolving those claims along with a stipulation that included a provision that the Rule 54(b) motion would become moot as soon as the stipulation was accepted and judgment entered. Thus, the stipulation and order took the place of the certification under Rule 54(b) and served to place the case in a like posture of finality for appeal purposes. Under the logic employed in *Clausen*, there is no possible reason not to treat this matter in a similar manner and find that the premature notice of appeal "ripened" upon the district court's acceptance of the stipulation which obviated the need for a Rule 54(b) hearing.

In finding that, unlike horseshoes, close is not good enough for Rule 54(b) purposes; the Federal Circuit has simply failed to acknowledge that the concept of "cumulative finality" for appeal purposes – even in the absence of a Rule 54(b) certification – has found virtually unanimous support in the various circuit courts of appeal that have had an occasion to address the issue. One such

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[2] The panel decision did not dispute that the Rule 54(b) motion would likely have been granted but for the "preemptive strike" by Meade to obviate the need for a hearing on the motion. However, the panel determined that the issue was "not before us" since the stipulation and subsequent order "did not constitute a certification for finality purposes." This holding is directly contrary to the holding of the Fifth Circuit in *Barrett, supra*, 95 F.3d at 379. Moreover, it is difficult to comprehend what useful purpose is served by rewarding Meade for having made impossible a Rule 54(b) certification which would have unquestionably resolved this matter in favor of hearing the appeal on the merits.

case is *Fadem v. United States*, 42 F.3d 533 (9th Cir. 1994).[3] *Fadem* involved an appeal from a final judgment disposing of less than all of a group of consolidated cases. No Rule 54(b) certification was obtained but the remaining cases were disposed of subsequently. *Fadem* granted a rehearing of an earlier decision of the Ninth Circuit stating that even though "Rule 54(b) certification would ordinarily be required, its absence was cured when the district court dismissed *Fadem I* and no appeal was taken from that dismissal." *Id.* at 535. (*Fadem I* was the only consolidated case that had not been resolved when the notice of appeal was filed). *See also IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054-55 (2nd Cir. 1993) ("a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice"); *Equipment Finance v. Traverse Computer Brokers*, 973 F.2d 345, 347-48 (4th Cir. 1992) (appeal from order that disposed of less than all the parties to a litigation reviewable under a "practical approach to finality" where no prejudice to the appellee is found to exist; in this case, the finality requirements of Rule 54(b) were "effectively satisfied" by the subsequent dismissal of the remaining parties).

One of the most recent cases to discuss and endorse the continued viability of this doctrine is *Lazy Oil Co. v. Witco Corporation*, 166 F.3d 581 (3rd Cir.) (Becker, C.J.), *cert. denied*, 120 S.Ct. 178 (1999). In *Lazy Oil*, an appeal was taken from an order that did not dispose of all the

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[3] Appeal dismissed by a subsequent joint stipulation. *Fadem v. United States*, 172 F.3d 648 (9th Cir. 1999).

issues relating to the settlement of class action litigation. Chief Judge Becker was faced with deciding whether (as panel held here) the "cumulative finality" doctrine which had been adopted by the Third Circuit in *Cape May Greene, Inc. v. Warren*, 698 F.2d 179 (3rd Cir. 1983) remained viable in light of the Supreme Court's *FirsTier* decision. *Id.* at 585-86.

Chief Judge Becker concluded that *FirsTier* did not serve to overrule the "cumulative finality" doctrine as had been alleged. Rather, he found that

> *FirsTier* simply limited the reach of [F.]Rule [App. P.] 4(a)(2)'s proviso. It did not hold that the Rule 4(a)(2) situation – announcement of a final decision followed by notice of appeal and then entry of judgment – is the only situation in which a premature notice of appeal will ripen at a later date. . . . [I]n a number of factual situations, a premature notice of appeal will become effective at a later date.

Id. at 587.[4]

Finally, Chief Judge Becker cited to Federal Rule of Appellate Procedure 2 which provides that a Court of Appeals may "suspend the requirements or provisions"

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[4] In addition, the facts of this case differ markedly from those in *FirsTier*. In *FirsTier*, a notice of appeal was filed prior to the entry of any judgment. 498 U.S. at 272. In this case, the notice of appeal filed by Reddwarf followed the entry of judgment on the patent issues. Under these circumstances it is arguable that both *FirsTier* and F.R.App. P. 4 have no applicability. *See IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d at 1055 n. 5. (Rule 4(a)(2) found inapplicable where notice of appeal followed entry of judgment as to less than all parties).

of a rule "to ensure that justice is not denied on the basis of a mere technicality." *Id.* He concluded his analysis as follows:

> For us to decline jurisdiction in this appeal would elevate a mere technicality above the important substantive issues here involved, as well as the right of the parties in this case to have their dispute resolved on its merits.

Id. Unfortunately, the Federal Circuit rejected Judge Becker's cogent reasoning and adopted what it viewed to be a "better view of the law" which it felt was more consistent with *FirsTier*. (App. 7)

However, the Federal Circuit's decision was in error. Where, as here, there is no prejudice alleged by Meade arising out of the hearing of this appeal on the merits and where the party moving to dismiss has been a participant in structuring the case to bring it to its present posture as Meade has, the dismissal of the appeal as ordered by the panel is justified by neither case law nor common sense. Reddwarf urges this Court to adopt the approach of "pragmatic finality" that the majority of courts of appeals have followed to find jurisdiction under like circumstances. To do otherwise would serve no purpose other than to reward Meade for its role in creating this situation in the first place. Reddwarf deserves to have its appeal heard on the merits. A writ of certiorari should be issued to permit that review on the merits to take place.

B. THE FEDERAL CIRCUIT FAILED TO APPLY FEDERAL RULE OF APPELLATE PROCEDURE 2 IN A MANNER NEEDED TO AVOID MANIFEST INJUSTICE UNDER THE CIRCUMSTANCES

Rule 2 of the Federal Rules of Appellate Procedure permits a court to suspend the rules on its own motion or upon a motion by a party. The notes to the rule indicate that a purpose of the rule is to allow courts to "relieve litigants of the consequences of default where manifest injustice would otherwise result." Advisory Committee Notes to Federal Rules of Appellate Procedure 2. Chief Judge Edward Becker of the Third Circuit Court of Appeals acknowledged this principle in the *Lazy Oil* decision, *supra*, when he wrote that:

> For us to decline jurisdiction in this appeal would elevate a mere technicality above the important substantive issues here involved, as well as the right of the parties to have their dispute heard on the merits.
>
> In this case, a notice of appeal was filed following final disposition of the key elements of the dispute: liability and the amount of damages. The appellees, both plaintiffs and defendants, were on notice that the objectors would be appealing the approval of the settlement and the denial of their motions by the District Court. No prejudice is claimed or apparent.

Lazy Oil, 166 F.3d at 587.

Chief Judge Becker's opinion in *Lazy Oil* was correct. Although Rule 2 cannot be used to expand the jurisdiction of the Court (*Torres v. Oakland Scavenger Co.*, 487 U.S.

312, 315 (1988)), "giving effect to a previously filed notice of appeal upon the district court's disposition of outstanding claims does not extend the time limits imposed on our [the Court's] jurisdiction." *Id.* at 587 n. 9.

The same result should be applied here. Meade should not be allowed to avoid an appeal of the district court's decision simply because the technicalities of the rules were not followed to the letter. This is not a situation where any ambiguity existed over the desire of Reddwarf to pursue a timely appeal. Even the stipulation prepared by Meade acknowledged that fact. Only by hearing the appeal on the merits can manifest injustice be avoided. A writ must issue to allow Reddwarf the opportunity to have its appeal heard on the merits as opposed to being decided on a pure technicality.

CONCLUSION

For the reasons set forth above, Reddwarf respectfully requests that the Court issue a Writ of Certiorari to review the judgment of the Court of Appeals for the Federal Circuit and resolve the conflict between the circuits on this fundamental issue of appellate jurisdiction.

Dated: July 10, 2001

Respectfully submitted,

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NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

99-1517

MEADE INSTRUMENTS CORPORATION,

Plaintiff-Appellee,

v.

REDDWARF STARWARE, LLC (also known as Reddwarf Instruments, LLC)

Defendant-Appellant.

ON MOTION

Before RADER, GAJARSA, and LINN, *Circuit Judges*.

LINN, *Circuit Judge*.

ORDER

(Filed June 23, 2000)

Meade Instruments Corporation moves to dismiss Reddwarf Starware, LLC's appeal for lack of jurisdiction. Reddwarf opposes and moves for costs and fees incurred in responding to the motion to dismiss. Meade replies.

Meade filed an action against Reddwarf in the United States District Court for the Central District of California for a declaration of patent invalidity and noninfringement, for antitrust and unfair competition violations, and for an injunction against claims that Meade's product infringed Reddwarf's patent. Reddwarf counterclaimed for patent infringement. On July 2, 1999, the court entered

summary judgment in favor of Meade on the noninfringement claim, expressly reserving judgment over the issue of attorney fees. The request for injunctive relief and the antitrust and unfair competition claims remained pending. On July 27, 1999, Reddwarf noted an appeal from the district court's July 2, 1999 judgment. On the same date, Reddwarf moved pursuant to Fed. R. Civ. P. 54(b) for certification of the July 2, 1999 judgment, and for certification of a May 11, 1998 order denying Reddwarf's motion to dismiss for lack of personal jurisdiction.

Pursuant to a stipulation of the parties, on August 24, 1999, the court dismissed without prejudice Meade's remaining claims and its request for injunctive relief, and removed from the calendar as moot Reddwarf's motion for Rule 54(b) certification. On January 18, 2000, the court "direct[ed] the entry of a final and appealable judgment forthwith," incorporating its earlier judgment of noninfringement, its dismissal pursuant to stipulation of Meade's remaining claims, and its award to Meade of $33,681.50 in attorney fees pursuant to 35 U.S.C. § 285. Reddwarf did not file a notice of appeal after entry of the January 18, 2000 judgment.

Meade moves to dismiss Reddwarf's appeal for lack of jurisdiction. Meade argues that Reddwarf's July 27, 1999 appeal was premature and ineffective to confer appellate jurisdiction to review the district court's final judgment, entered on January 18, 2000, which disposed of all claims asserted in the complaint. Meade argues that Reddwarf erred in failing to file a notice of appeal within 30 days of the final judgment as required by Fed. R. App. P. 4(a)(1)(A).

Reddwarf opposes dismissal, arguing that "the decision from which an appeal was take [sic] by Reddwarf was unquestionably a final one as to the only real issue in the case," and that the other remaining claims asserted by Meade "were merely gratuitous window dressing." It further asserts that its motion for Rule 54(b) certification "would in all likelihood have been granted" if Meade had not stipulated to dismissal of its remaining claims, and that "the stipulation and order took the place of the certification under Rule 54(b) and served to place the case in a like posture of finality for appeal purposes." Reddwarf additionally urges the court to follow the approach of "pragmatic finality" based on the circumstance of this case, arguing that "[t]o do otherwise would serve no purpose other than to reward Meade for its role in creating this situation in the first place." Reddwarf also moves for an award of costs and attorney fees "incurred in responding to this frivolous motion."

Fed. R. App. P. 4(a)(2) provides that "[a] notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." While the parties dispute the applicability of this rule, they agree that resolution of the jurisdictional question must begin with the Supreme Court's decision in *FirsTier Mortgage Company v. Investors Mortgage Insurance Company*, 498 U.S. 269 (1991). In *FirstTier*, the Court was faced with a premature notice of appeal filed after the court orally announced its intention to grant summary judgment, but before the parties had submitted proposed findings of fact and conclusions of law and before the court had entered judgment. The Court concluded that "Rule 4(a)(2)

permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." It continued:

> Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment. This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision – such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure – to serve as notice of appeal from the final judgment. A belief that such a decision is a final judgment would not be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise.

The Court concluded that because the trial court's oral ruling announced a decision purporting to dispose of all claims, the appellant's belief in the finality of that ruling was reasonable, and its premature notice of appeal should be treated as an effective notice from the later-entered judgment.

Before *FirsTier*, some of our sister circuits had adopted the doctrine of "cumulative finality" in which a

premature notice of appeal ripened and secured appellate jurisdiction when the district court's judgment became final before disposition of the appeal.[1] Reddwarf argues the continued viability of that doctrine, relying on *Lazy Oil Co., v. Witco Corporation*, 166 F.3d 581, (3rd Cir. 1999), where the Third Circuit concluded that its decision outlining the cumulative finality doctrine had not been overruled by *FirsTier*. The court in *Lazy Oil* found no inconsistency because the Supreme Court in *FirsTier* "did not hold that the Rule 4(a)(2) situation – announcement of a final decision followed by notice of appeal and then entry of the judgment – is the only situation in which a premature notice of appeal will ripen at a later date." Reddwarf also relies heavily on *Barrett v. Atlantic Richfield Company*, 95 F.3d 375 (5th Cir. 1996), a case in which a group of plaintiffs had appealed an order granting summary judgment against them even though the claims asserted by other plaintiffs had remained pending. Although a new notice of appeal was not filed by the appellants after the remaining claims were disposed of by final order, the *Barrett* court nevertheless determined, based on *FirsTier*, that "[b]ecause the district court's order would have been appealable if followed by Rule 54(b)

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[1] *See Sacks v. Rothberg*, 845 F.2d 1098, 1099 (D.C. 1988); *Gillis v. U.S. Dep't of H. & H. Services*, 759 F.2d 565, 569 (6th Cir. 1985); *Alcorn County v. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165-66 (5th Cir. 1984); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 184-85 (3rd Cir.1983); *Martin v. Campbell*, 692 F.2d 112, 114 (11 th Cir. 1982); *Pireno v. New York State Chiropratic Ass'n*, 650 F.2d 387, 389 n. 4 (2d Cir. 1981), aff'd. sum nom. *Union Labor Life Ins. Co. v. Pireno*, 458 U .S. 110 (1982); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677, 681-81 (9th Cir. 1980); *Merchants & Planters Bank v. Smith*, 516 F.2d 355, 356 n.3 (8th Cir. 1975).

certification and order, Rule 4(a)(2) permits the court to exercise its jurisdiction."

In contradistinction, a number of other circuits have concluded that *FirsTier* has limited the applicability of R. 4(a)(2). In *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), the court opined that "*FirsTier* appears to save a notice of appeal filed after a decision when the litigant could reasonably believe that the outcome of the case is settled, even if the district court has ministerial duties left to complete." The court further explained that "a litigant seeking to take advantage of Rule 4(a)(2)'s saving provision must continue to be reasonably 'confused as to the status of the litigation' . . . until final judgment is actually entered. If the litigant becomes aware of the fact that the notice of appeal is invalid because no final judgment has yet been entered, then he or she has both the knowledge and the opportunity (for thirty more days) to correct the mistake." In *United States v. Cooper*, 135 F.3d 960 (5th Cir. 1998), the court ruled that after *FirsTier*, "[o]nly where the appealing party is fully certain of the court's disposition, such that the entry of final judgment is predictably a formality, will appeal be proper." It additionally concluded that the expansive view of appellate jurisdiction outlined in its pre-*FirsTier* decisions "cannot survive" in light of *FirsTier*, and that *FirsTier* "allows premature appeals only where there has been a final decision rendered without a formal judgment."[2] *See also In re Jack Raley Construction, Inc. v.*

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[2] *Cooper* appears inconsistent with the Fifth Circuit's earlier decision in *Barrett* on which Reddwarf heavily relies, and it leaves doubt as to whether *Barrett* remains good law.

Homestead Development Company, Inc., 17 F.3d 291 (9th Cir. 1994) (premature notice of appeal valid where only ministerial functions left to complete, not when trial court adjudication incomplete); *Serine v. Peterson*, 989 F.2d 371 (9th Cir. 1993) (appeal from magistrate order premature because order could not form the basis of a final judgment); *but see Fadem v. U.S.*, 42 F.3d 533 (9th Cir. 1994) (absence of Rule 54(b) certification cured and premature appeal effective when remaining consolidated case dismissed), *cert. granted, judgment vacated, case remanded for further consideration*, 520 U.S. 1101 (1997), *opinion reinstated*, 164 F.3d 1242 (9th Cir. 1999).

We conclude that the latter group of cases provides the better view of the law. In our view, the Supreme Court's *FirsTier* decision prevents us from asserting appellate jurisdiction over this case. Unlike the situation in *FirsTier*, the district court's order did not purport to dispose of all of Meade's claims and, importantly, Reddwarf's motion for Rule 54(b) certification belies any notion that it was under the mistaken impression that the district court's order was final and appealable. While Reddwarf may be correct that absent Meade's stipulation to dismissal of its remaining claims the district court may have certified the issues for immediate review, that situation is not before us and the stipulation and order did not constitute a certification for finality purposes. It is not Meade's action that precludes our appellate jurisdiction, but rather Reddwarf's inaction in failing to appeal after

the district court issued a final judgment resolving all claims and issues in the case.

Accordingly,

IT IS ORDERED THAT:

(1) Meade's motion to dismiss is granted.

(2) Reddwarf's motion for costs and attorney fees is denied.

(3) Each side shall bear its own costs.

FOR THE COURT

JUN 23 2000
Date

/s/ Richard Linn
Richard Linn
Circuit Judge

cc: William J. O'Brien, Esq.
Gary E. Lande, Esq.

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ISSUED AS A MANDATE, JUN 23 2000

United States Court of Appeals for the Federal Circuit

ORDER

(Filed Mar. 12, 2001)

A combined petition for panel rehearing* and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate has already issued.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: March 12, 2001

cc: Gary E. Lande
William J. O'Brien

MEADE INSTRUM V REDDWARF STARWARE, 99-1517 (DCT – 98-CV-240)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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* The petition for panel rehearing was denied on February 27, 2001.